SUBJECT INDEX

	Page
Statutes Involved	2
Questions Presented	2
Statement	2
Argument:	
Point 1	2
Point 2	8
Point 3	9
Point 4	10
Point 5	11
Point 6	13
Conclusion	13

TABLE OF CITATIONS

Cases:

PAGE

Belk Department Store, Inc. v. Gilford County, 222 N. C. 551, 23 S. E. (2d) 897, 902 (1943) 8

Boehmer v. Pennsylvania Railroad Co., 252 U. S. 496, 498, 40 S. Ct. 406, 64 L. Ed. 680, 684 (1920) 5

City of Columbia v. South Carolina Public Service Commission, 242 S. C. 528, 131 S. E. (2d) 705 (1963) 4

Conway v. California Adult Authority, 396 U. S. 107, 109-10, 90 S. Ct. 312, 24 L. Ed. 295, 298, reh. den., 396, U. S. 1030, 90 S. Ct. 544, 24 L. Ed. (2d) 527 (1969) .. 10

Drumheller v. Berks County Local Board No. 1, 130 F. (2d) 610 (3rd Cir. 1942) 5, 8, 12

Gilbert v. California, 388 U. S. 263, 269, 87 S. Ct. 1951, 18 L. Ed. (2d) 1178, 1184 (1967) 10

Harris v. Carolina Power and Light Co., 243 N. C. 438, 90 S. E. (2d) 694 11

Jacoby v. South Carolina State Board of Naturopathic Examiners, 219 S. C. 66, 64 S. E. (2d) 138 (1951) .. 4

In Re Markham, 250 N. C. 566, 131 S. E. (2d) 329, 332 (1963) 9, 12

McConley v. State, 220 Ga. 377, 139 S. E. (2d) 292, 293 (1964) 11

Pettiford v. South Carolina State Board of Education, 218 S. C. 322, 62 S. E. (2d) 780 (1950) 4

State of Minnesota v. State Board of Education, 6 N. W. (2d) 251, 143 A. L. R. 503 (Sup. Ct. Minn. 1942) 4

Williams v. Williams, 261 N. C. 48, 134 S. E. (2d) 227, 231 (1964) 11

Wright v. State, 7 S. E. (2d) 292 (Ct. App. Ga. 1940) .. 11

Wyse v. Wolfe, 129 S. C. 499, 123 S. E. 818 (1924) 8

TABLE OF CITATIONS—Continued

Statutes:

	PAGE
Title 42 U. S. Code Section 3102	2
Act 571 of South Carolina, 1971	2

Other Authorities:

14 Am. Jur. (2d) Certiorari § 18, 20	8
14 C. J. S. Certiorari § 13, page 141	13
14 C. J. S. Certiorari § 72, page 215	11
14 C. J. S. Certiorari § 32, page 177	10
14 C. J. S. Certiorari § 172, pages 312-313	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-554

WALTON W. MIMS, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF CITIZENS COMPOSED OF RESIDENTS AND TAXPAYERS OF A COMMON GEOGRAPHICAL SUBDIVISION, PETITIONERS,

versus

W. G. YARBOROUGH, FRANK COOPER, H. B. KEMP, CRAFTON TIMMERMAN AND J. O. BUSSEY, ALL AS MEMBERS OF THE EDGEFIELD COUNTY WATER AND SEWER AUTHORITY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent accepts, for purposes of this Brief in Opposition, the material in the Petition for *Certiorari* under the headings, "Opinion Below" and "Jurisdiction".

STATUTES INVOLVED

The statutes involved are fully set forth in the Petition for *Certiorari*, pages 4 through 16, with the exception of 42 U. S. C. § 3102 which is set out in the opinion of the District Court attached to the Petition for *Certiorari* as an exhibit at 343 F. Supp. pages 1160-61 and applicable provisions of Act No. 571 of the Acts and Joint Resolutions of the General Assembly of the State of South Carolina for 1971 which are set out in the opinion of the District Court at 343 F. Supp. pages 1149-50.

QUESTIONS PRESENTED

1. Whether the Supreme Court should grant *certiorari* to review the exercise of discretion by the Edgefield County Water and Sewer Authority in locating a water line along a different route than that advocated by the petitioner.

2. Whether the decision of the District Court concurred in by the Court of Appeals that the Water Authority's proposed distribution system is in compliance with the applicable federal statutes is supported by the evidence.

STATEMENT

The facts of the case are stated fully in the opinion of the District Court attached to the Petition for *Certiorari*, 343 Fed. Supp. pages 1148 through 1153.

ARGUMENT

1. The decisions below involve questions of fact and not of law.

The District Court's decision was based upon the following findings of fact set forth in the opinion:

> "It therefore appears from the credible evidence and the court finds as a fact that the area described by the plaintiff as the 'rural heart of Edgefield County' is not ignored in the proposed Water Distribution Plan

and that the Highway 23 route proposed by the plaintiff was given proper consideration by the Authority.

"The court also finds that the water system, as it is presently proposed by the Water Authority, fulfills the purposes of the Public Works and Economic Development Act of 1965, as set forth in 42 U. S. C. § 3121 and the criteria established by EDA in the administration of that Act." 343 F. Supp. 1157.

"From the credible evidence the court finds as a fact that the economic feasibility considerations employed by the water authority were required by FHA and that a consideration of such factors does not make the project ineligible for participation by EDA." 343 F. Supp. 1157.

"... The court also finds that large concentrations of disadvantaged persons are located along the Highway 25 route proposed by the water authority and that the water system, as it is presently proposed, will provide basic public services to many of these disadvantaged persons. Further, that opportunities for industrial development will be created along the Highway 25 route proposed by the water authority, and that these opportunities will be accessible to persons living in all areas of Edgefield County and will tend to diminish out-migration from these areas." 343 F. Supp. 1157-58.

"The court finds as a fact that the plans for a county-wide water system for Edgefield County, as is presently proposed by the water authority, contemplate the receipt and use of a $1,694,000.00 FHA loan for purposes consistent with 7 U. S. C. § 1926 and the criteria established in the administration of this statute by FHA." 343 F. Supp. 1159.

"FINDING OF FACT

"The county-wide water system for Edgefield County, as it is presently proposed by the water authority, contemplates the receipt and use of an HUD loan to finance basic public works in smaller municipalities for which there is an urgent and vital public

need consistent with the requirements of 42 U. S. C. § 1492." 343 F. Supp. 1160.

"The court finds as a fact that the plans for a county-wide water system for Edgefield County, as it is presently proposed by the water authority, contemplates the receipt and use of an HUD Grant to finance its specific project for basic public water facilities in compliance with the requirements of 42 U. S. C. § 3102." 343 F. Supp. 1161.

The Court of Appeals concurred in these findings of fact by the District Court.

"PER CURIAM: For the reasons stated by the District Judge, we find no inconsistency between the plans for this water distribution system and the requirements of the federal statutes under which loans and grants have been authorized to finance its construction. *Mims v. Yarborough*, D. S. C., 343 F. Supp. 1146. Affirmed." 461 F. (2d) 1266.

It is well settled that a Superior Court on Writ of *Certiorari* will confine its review to the correction of errors of law only and will not review the findings of fact of an inferior court except when such findings are entirely without support in the evidence. *City of Columbia v. South Carolina Public Service Commission*, 242 S. C. 528, 131 S. E. (2d) 705 (1963; *Jacoby v. South Carolina State Board of Naturopathic Examiners*, 219 S. C. 66, 64 S. E. (2d) 138 (1951); *Pettiford v. South Carolina State Board of Education*, 218 S. C. 322, 62 S. E. (2d) 780 (1950).

". . . the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal. . . ." *State of Minnesota v. State Board of Education*, 6 N. W. (2d) 251, 143 A. L. R. 503 (Sup. Ct. Minn. 1942).

". . . a writ of *certiorari* will not lie to enable a superior court to pass upon, revise or reverse the decision of a lower tribunal as to matters of fact. [Citations omitted]. We believe that there are no cases to the contrary." *Drumheller v. Berks County Local Board No. 1,* 130 F. (2d) 610 (3rd Cir. 1942).

"Likewise we accept the concurrent judgment of the lower courts [on this question] . . . . [This question] depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances, where two courts have agreed, we will not enter upon a minute analysis of the evidence." *Boehmer v. Pennsylvania Railroad Co.,* 252 U. S. 496, 498, 40 S. Ct. 406, 64 L. Ed. 680, 684 (1920).

". . . A finding or decision of the inferior tribunal, within its jurisdiction, on facts supported by competent and substantial evidence, is binding on the reviewing court and will not be reviewed by it, particularly where the finding or decision has been concurred in by the trial court and an intermediate appellate court, or where it is against a party who does not bring *certiorari.*" 14 C. J. S. *Certiorari,* § 172, pages 312-13.

That the findings of the District Court, concurred in by the Court of Appeals, are supported by substantial evidence, is shown by the following evidence quoted or summarized in the District Court's opinion:

"Dan B. Mackey, Executive Director of the Upper-Savannah Planning and Development District, in Paragraph 5 of his Affidavit, dated August 31st, 1971, states that:

> 'From his careful study, the proposed project is critically needed, well-planned, ideally located and will provide an outstanding improvement for the underprivileged, unemployed and marginal economic groups of Edgefield County, and is essential to improving the economic conditions there.'" 343 F. Supp. 1160.

". . . The Economic Development Administration of the Department of Commerce has designated all of Edgefield County as a re-development area. That portion of Aiken County that is included within the service area of the Edgefield County Water and Sewer Authority has been designated by the Economic Development Administration as a part of the growth center area, making it eligible for all assistance available under the Economic Development Administration Program." Affidavit of Dan B. Mackey, 343 F. Supp. 1155.

"The Chief Engineer for FHA (Cecil Rose) testified that additional information had been requested from the Engineer relative to the Highway 23 route proposed by the plaintiff, that such information was furnished by the Engineer and that subsequent to the furnishing of such information the project was approved by the three agencies. He testified that he had met on several occasions with the Chief Engineers of EDA and HUD at which time the project was reviewed in light of the criteria established by the three agencies and subsequently that the project was approved by each of the three agencies." 343 F. Supp. 1156.

"Emmett Davis, President of the Engineering firm employed by the Water Authority testified that his firm had considered the Highway 23 route advocated by the plaintiff together with another alternate route in the same general area before making a final decision to recommend the Highway 25 route to the Water Authority. He testified that the Highway 25 route would serve Seventy-Five (75%) per cent of the population of Edgefield County in Phase I of the Comprehensive Plan developed by his firm, and that a water line along the Highway 23 route proposed by the plaintiff from Edgefield toward Modoc was scheduled for Phase II of the Comprehensive Plan during the next ten (10) to twenty (20) years as funds become available." 343 F. Supp. 1156.

"Mr. Davis further testified that he had worked on several EDA projects and, as such, had become

familiar with the thrust and emphasis of the EDA in applying the Public Works and Economic Development Act of 1965. He testified that their main considerations in providing assistance for water facilities were to provide industrial opportunities in chronically depressed areas and to provide essential public services to disadvantaged persons. He testified that his firm had reviewed the project in light of these considerations and had determined that the Highway 25 route would provide an essential public service to large concentrations of disadvantaged persons along Highway 25 and would provide opportunities for industrial development along the route which would provide employment opportunities accessible to residents of all areas of Edgefield County." 343 F. Supp. 1157.

"Both the Chief Engineer for FHA and the State Director for FHA for South Carolina testified that they had carefully reviewed the project and applied the criteria established by FHA in the administration of this Act. They testified that under the criteria established by FHA, loans could be made to finance water facilities in rural areas and in small municipalities having a population of less than 5,500. They both testified that the Towns of Edgefield, Trenton and Johnston each had populations of less than 5,500, and that the remainder of the area serviced by the authority was a rural area eligible for FHA financing." 343 F. Supp. 1159.

"Mr. Emmett Davis, President of the Engineering firm employed by the water authority, testified at length as to the urgent need of the three towns to provide water treatment and distribution facilities both for industrial and residential purposes." 343 F. Supp. 1160.

"As each of the Towns of Edgefield, Johnston and Trenton has a population of less than 10,000 inhabitants, each would come within the smaller municipality category of 42 U. S. C. § 1942 and would be entitled to priority under that section." 343 F. Supp. 1160.

2. The actions sought to be reviewed are discretionary acts of administrative agencies.

The District Court noted this fact in its opinion in the following manner:

> "The matters complained of by the plaintiff relate to the exercise of judgment or discretion by executive departments of the federal government and by the duly appointed members of the Edgefield County Water and Sewer Authority. . . ." 343 F. Supp. 1161.

Certiorari should not be invoked to review acts which are merely ministerial, executive, or administrative or to test the proper exercise of discretion vested in a public official or administrative board. 14 *Am. Jur.* (2d) *Certiorari* § 18, 20; *Drumheller v. Berks County Local Board No. 1*, 130 F. (2d) 610 (3rd Cir. 1942); *Wyse v. Wolfe*, 129 S. C. 499, 123 S. E. 818 (1924).

> "Some attention might be given here to the apparent assumption upon which this petition for *certiorari* proceeds—that every act of an administrative board involving the exercise of sound judgment and discretion must be submitted to court review on the theory that the act is judicial. It is not expected that the law will be administered by robots. It is inevitable that in following the ordinary procedure imposed upon them by statute, boards of this kind must perform some acts not purely ministerial, make some decisions to which sound judgment and discretion must be applied. . . . The simple fact that the result is reached by similar processes of reason, common to all men, does not expropriate the exercise of these facilities to the judiciary. . . ." *Belk Department Store, Inc. v. Gilford County*, 222 N. C. 551, 23 S. E. (2d) 897, 902 (1943).
>
> " 'At common law and under the practice in most jurisdictions, the writ of *certiorari* will lie to review only those acts which are judicial or *quasi* judicial in their nature. It does not lie to review or annul any judgment or proceeding which is legislative, executive,

or ministerial rather than judicial. The writ does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions.' 10 *Am. Jur., Certiorari:* § 10; 14 *C. J. S. Certiorari* 18b." *In Re Markham*, 250 N. C. 566, 131 S. E. (2d) 329, 332 (1963).

A contrary rule would prolong federal actions to such an extent as to seriously interfere with the proper functioning of local, state and federal administrative agencies in the exercise of such important functions as the locating of highways, public buildings, dams, waste treatment plants, water lines and other essential public facilities. To require a review of the location of these projects beyond the federal district and appellate court level would cause such extended delays as to be disruptive of the administrative process and burdensome to the public.

3. The question set out in the petitioner's writ is an abstract, hypothetical question not supported by the record.

The question posed in the petitioner's writ at page 4 is as follows:

> "Can a proposed water system as funded by four Federal Acts be planned so as to violate specific sections of one or more of those Federal Acts and the intent of Congress in regard thereto?"

Based on substantial evidence the District Court found that the proposed water system as planned by the Water Authority did **not** violate any of the four Federal Acts. The Court of Appeals concurred. (See point 1 discussed above.) Thus it appears that the question posed is an abstract question not supported by the record. The Supreme Court should defer consideration of this question for a case where the planned water system actually involves the violation of some Federal Act.

> ". . . The writ will not issue merely to give an opportunity to determine abstract, academic, hypothe-

tical, or moot questions, even though such a determination would be of public interest. . . ." 14 *C. J. S. Certiorari* § 32, page 177.

". . . We granted *certiorari* to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when *certiorari* was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. . . ." *Gilbert v. California*, 388 U. S. 263, 269, 87 S. Ct. 1951, 18 L. Ed. (2d) 1178, 1184 (1967).

". . . Thus, it now appears respondents have documentary evidence that the actual facts simply do not present the issue for which *certiorari* was granted by us.

". . . this court . . . [has] unwittingly been placed in the unfortunate posture of addressing a situation that does not exist.

"In this state of affairs we decline to adjudicate this case. Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for *certiorari* we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this court. Accordingly, the writ of *certiorari* is dismissed as improvidently granted." *Conway v. California Adult Authority*, 396 U. S. 107, 109-10, 90 S. Ct. 312, 24 L. Ed. 295, 298, reh. den., 396, U. S. 1030, 90 S. Ct. 544, 24 L. Ed. (2d) 527 (1969).

4. The question set forth in the petitioner's writ constitutes a general allegation of error in which the particular errors complained of are not clearly set forth.

The question set forth in the petitioner's writ at page 4 asks whether a water system can be so planned "as to violate specific sections of one or more federal acts." It does not identify what aspects of the planned water system are in violation of the acts nor the specific sections

that such actions are alleged to violate. See 14 *C. J. S. Certiorari* § 72, page 215. This type of question has been characterized as "broadside." *Harris v. Carolina Power and Light Co.*, 243 N. C. 438, 90 S. E. (2d) 694.

> ". . . In order to review His Honor's ruling . . . it would be necessary for this court to perform a mapping operation undertaking a 'voyage of discovery' through the record. We will do neither. . . ." *Williams v. Williams*, 261 N. C. 48, 134 S. E. (2d) 227, 231 (1964).
>
> ". . . In the petition before us, the ruling complained of is set out, but no specific assignment of error is made on this ruling. This does not meet the requirements of the rule. The petition must set out a specific ruling and assign error thereon. . . ." *McConley v. State*, 220 Ga. 377, 139 S. E. (2d) 292, 293 (1964).
>
> "The assignments of error are upon the general grounds only. The evidence supports the verdict. The court did not err in dismissing the *certiorari*." *Wright v. State*, 7 S. E. (2d) 292 (Ct. App. Ga. 1940).

5. The granting of certiorari will result in great public detriment and inconvenience.

There is evidence in the record, quoted in the opinion of the District Court, that:

> ". . . The proposed project is critically needed, well planned, ideally located and will provide an outstanding improvement for the underprivileged, unemployed and marginal economic groups of Edgefield County, and is essential to improving the economic conditions there." 343 F. Supp. 1160.

While litigation is pending against the Water Authority, the Authority cannot issue the bonds necessary to finance the project because prospective bond buyers will not purchase bonds without a no litigation certificate. Consequently, the project has been delayed for more than a year since the filing of the Complaint in this action on Au-

gust 26, 1971 (see the "chronology" of the District Court at 343 F. Supp. 1150-51). If *certiorari* is granted, it will result in further delays and greater detriment and inconvenience to the people of Edgefield County.

The District Court noted the damaging effect of the pendency of this action:

> "In addition, this court must consider the tremendously damaging effect that the granting of an injunction in this case would have upon the public interest. . . ." 343 F. Supp. 1161.
>
> "There is ample evidence in the record of the damaging effect of the pendency of this action upon this project:
>
> > 'That if such project is delayed or blocked, such will tend to hazard the eventual availability of funds, since timing is very important relative to availability. No one can say with certainty the impact of considerable delay by reason of litigation, but such delay would present a real potential hazard to ultimate availability.' Affidavit of Dan B. Mackey, paragraph 6.
>
> "The plaintiff appears to agree on this point, reference being made to the last paragraph of the plaintiff's brief.
>
> > 'A delay of a few months would certainly be costly to the project. A delay of even a few years in getting a water system planned for the rural areas, and an eventual delivery of water completed would be fatal to Edgefield County. The people will have all moved away; the County would have died.' " 343 F. Supp. 1163.

There is considerable authority for the proposition that a writ of *certiorari* may be dismissed on the ground that public detriment will result. *Drumheller v. Berks County Local Board No. 1*, 130 F. (2d) 610, 612 (3d Cir. 1942); *In Re Markham*, 259 N. C. 566, 131 S. E. (2d) 329, 332 (1963).

"Where great public detriment or inconvenience would result or might have resulted from interferring with the proceedings of public bodies which exercise rights in which the people at large are concerned, and no substantial injury would result from its refusal, the writ has been denied, and its allowance in such cases is discretionary. Thus, in a case where the allowance of the writ would perhaps suspend for a considerable period of time the prosecution of a great public work of prime necessity to a large number of persons, the discretion lodged in a superior court in the matter of the allowance of the prerogative writ should be sparingly exercised." 14 *C. J. S. Certiorari* § 13, page 141.

6. There is no conflict with the decisions of this court or of other Circuit Courts of Appeals.

The decisions below are clearly correct and supported by substantial evidence. The petitioner does not cite any decision of this Court or of the other Circuit Courts of Appeals, nor does the petitioner assert that the decisions below are in conflict therewith. Manifestly, there is no important question of law requiring review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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